



Cash Grants for Energy Property

Energy property placed in service in 2009 or 2010 qualifies for a cash grant from the US Department of the Treasury for up to 30 percent of eligible costs¹ in lieu of energy credits that would otherwise be available. There is generally no cap on the amount of the grant that can be received with respect to a qualifying facility and no national or state-by-state cap on the grant program. Facilities that are under construction at the end of 2010 (but not placed in service) can also qualify for a grant if they are placed in service by specific dates between 2012 and 2016 based on the type of property.

The grant program was created by Section 1603 of the American Recovery and Reinvestment Act of 2009 (ARRA) in recognition of the temporary diminished investor demand for tax credits. On July 9, 2009 Treasury provided initial program guidance and a sample application for applying for a grant on its [website](#).

An application for a grant must be submitted by the owner of the qualifying facility, even where the right to receive the grant will be passed through to a lessee. An application cannot be submitted until the project is placed in service. For projects under construction by the end of 2010 but not yet placed in service, the application must be submitted by October 1, 2011 and must be updated once the project is placed in service. The application must be completed online and requires that the owner first obtain a Data Universal Numbering System (DUNS) number and register with the Central Contractor Registration.

ARRA requires that grants be paid within 60 days of the latter of the application or placement in service, but Treasury can request supplemental information to

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confirm eligibility upon receipt of an application, and the 60-day period apparently will not begin until the supplementary information is submitted. An applicant has only 21 days to provide supplemental information, and, if the applicant fails to timely respond, the application will be denied and no appeal allowed.

ARRA provided that certain entities, *viz.*, a government or tax-exempt entity, or a pass-through entity in which such entities own an interest, are ineligible to receive a grant. The guidance indicates that pass-through entities can qualify for a grant if a "blocker" for-profit C corporation is interposed between the ineligible entity and the pass-through entity. Additionally, a non-US person is eligible for the grant only if they are subject to US federal income taxes. The guidance does not address use of a project by a governmental or tax-exempt entity.

Treasury's guidance contains detailed rules on what constitutes "beginning construction" for projects not placed in service by the end of 2010. A safe harbor is established under which incurring or paying more than five percent of the total cost of the property would generally be treated as beginning construction.

The rights to receive a grant can be "passed through" to a lessee under current rules allowing an investment tax credit to also be passed through to a lessee. In this case, no reduction in basis of the property is required, but the lessee must take into account one-half of the grant as income over the five-year recapture period.

Where the right to receive a grant is not passed through to a lessee, the owner must reduce the tax basis in the energy property by one-half of the grant amount. The grant is not treated as taxable income.

The grant is "recaptured," and must be repaid, if the property is disposed of to a disqualified person within five years or otherwise ceases to qualify; the recapture payment declines by 20 percent each year.

Treasury confirmed that receiving a grant for a project does not, by itself, make that project subject to the federal "prevailing wage" under the Davis-Bacon Act or the requirements of the National Environmental Policy Act. A grant received by a regulated public utility must be normalized under the Section 46(f) rules.

Please contact your primary Squire Sanders lawyer with questions or for more information about the energy property grant program.

¹ Several types of energy property qualify for a grant: wind (including "small wind," i.e., 100 kW or less); solar; open-loop and closed-loop biomass; geothermal (including geothermal heat pumps); hydropower;

fuel cells; trash and landfill gas facilities; microturbines; marine and hydrokinetic facilities; and combined heat and power facilities. A few of the preceding facilities are eligible for only a 10-percent grant.



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2009

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